

January 29, 2010

VIA EMAIL: RHEALER@USBR.GOV

Ms. Rain Healer
U.S. Bureau of Reclamation
1243 N Street
Fresno, CA 93721

**Re: Draft Environmental Assessment and Finding of No Significant Impact for the
San Luis Unit Water Service Interim Renewal Contracts**

Dear Ms. Healer:

These comments on the referenced documents are submitted on behalf of the Hoopa Valley Tribe. The Tribe is directly affected by the contracts that are the subject of the Draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) under consideration.

The Tribe has resided since time immemorial on the Trinity River and relied on its fishery which is essential to its culture, religion and economy. The irrigation of the west side of the San Joaquin Valley was made possible in major part by the Trinity River Division of the Central Valley Project. See H.R. Rept. No. 602, 84th Cong., 1st Sess. 4 (May 19, 1955). The Tribe has vested property rights in the fishery resources of the Trinity River that have been affirmed judicially, legislatively and administratively.

The Bureau of Reclamation impounds waters of the Trinity River in the Central Valley Project's (CVP) Trinity Division and exports them to the Central Valley in major part for use on the lands of contractors whose contracts are the subject of the draft EA and FONSI. The Bureau of Reclamation is subject to an explicit and unique federal trust responsibility to the Tribe's fishery that was confirmed by the Central Valley Project Improvement Act (CVPIA), Pub. L. 102-575 §3406(b)(23). The CVP's diversions of Trinity River water are subject to basin of origin protections established in the legislation authorizing the Trinity Division, Pub. L. 84-386. The Tribe's rights have been and are directly and adversely affected by those diversions. See Pub. L. 98-541 (October 24, 1984), as amended. The Tribe's rights are further recognized in a December 19, 2000, Trinity River Mainstem Fishery Restoration Record of Decision (ROD). The ROD was adopted by the Secretary with the concurrence of the Hoopa Valley Tribe to restore the Tribe's damaged fishery. By letter of July 10, 2008, to the Chairman of the Tribe, the Office of the Secretary of the Interior established the Tribe as a stakeholder with interests in and affected by the use of CVP water by the contractors who would benefit by the pending Interim Renewal Contracts.

The Tribe submitted comments to the Bureau's Sacramento office on interim contract renewal on February 14, 2008. That letter is attached and sets forth detailed comments on contracts held by some of the same contractors whose contracts are subject to the pending EA and FONSI. The comments in the February 14, 2008, are incorporated herein by reference.

The Draft EA addresses Indian Trust Assets at page 36, stating that:

ITA are legal interests in property held in trust by the United States for federally-recognized Indian tribes or individual Indians. An Indian trust has three components: (1) the trustee, (2) the beneficiary, and (3) the trust asset. ITA can include land, minerals, federally-reserved hunting and fishing rights, federally-reserved water rights, and in-stream flows associated with trust land. Beneficiaries of the Indian trust relationship are federally-recognized Indian tribes with trust land; the United States is the trustee. By definition, ITA cannot be sold, leased, or otherwise encumbered without approval of the United States. The characterization and application of the United States trust relationship have been defined by case law that interprets Congressional acts, executive orders, and historic treaty provisions.

The Proposed Action would not affect ITA because there are none located in the Proposed Project area. The nearest ITA is the Santa Rosa Rancheria, which is approximately six miles east of the Proposed Action area.

Correspondingly, the draft FONSI proposes to draw the following conclusion about ITA:

No physical changes to existing facilities are proposed and no new facilities are proposed. Continued delivery of CVP water to the contractors listed in Table 1 under an interim renewal contract will not affect any Indian Trust Assets because existing rights will not be affected.

The conclusions of the draft EA and FONSI are in conflict with the facts and the law and should be revised. The Tribe's fishing and associated water rights in the Trinity River are Indian Trust Assets. The most recent statement from the Department of the Interior about the status of the Tribe's property rights as Indian Trust Assets was on January 26, 2010. In a letter of that date to tribal Chairman Leonard Masten, Associate Deputy Secretary Laura Davis stated that

Interior takes seriously its trust responsibility to the [Hoopa Valley] Tribe and the direction from Congress to restore the fishery resources of the Trinity River based in part on that duty. Interior also agrees that the Tribe has relatively senior water rights in the basin to support its reserved fishing rights, although the full extent and scope of these rights have not been quantified by adjudication or settlement. As of this time, the flows called for by Congress in section 3406(b)(23) of the 1992 Central Valley Project Improvement Act (P.L. 102-575) and then established in the 2000 ROD

with the Tribe's concurrence essentially determined by statute the water necessary in the Trinity River. As noted in your letter, the tribe's fishing and associated water rights--along with those of other basin Tribes collectively--have generally been the subject of prior departmental memoranda and Federal court cases.

We note that it is irrelevant to the environmental review that the Tribe's reservation is not in the vicinity of the Proposed Action Area. The water to which the Tribe has a right and whose use is essential to its fishery resources is being delivered and will continue to be delivered pursuant to the proposed federal action from the vicinity of the reservation to the contractors' area by CVP facilities that divert water from the Tribe's watershed.

In addition, the ongoing delivery of CVP water to the contractors in the absence fulfilling their statutory obligation to pay the cost of fishery restoration is affecting the Tribe. At the time the ROD was adopted in 2000 and since then, the Department has recognized that the flows allocated to the Trinity fishery from the Trinity Division will be effective for fishery restoration only if they are accompanied by adequate funding to carry out habitat restoration and related science and monitoring activities. As recently as 2007, the Secretary and the Tribe jointly identified a funding need of \$16.4 million annually (October 2007 price levels) for restoration through completion of construction and \$11 million (October 2007 price levels) annually thereafter. Underscoring the Tribe's concern is the persistent efforts of the contractors to challenge the ROD and oppose measures that would ensure that they fulfill their funding responsibility. See Westlands Water District v. U. S. Dept. of the Interior, 376 F.3d 853 (9th Cir. 2004) and Testimony of Ara Azhderian, Water Policy Administrator, San Luis & Delta-Mendota Water Authority Regarding H.R. 2733, Trinity River Restoration Fund Act of 2007, September 18, 2007.

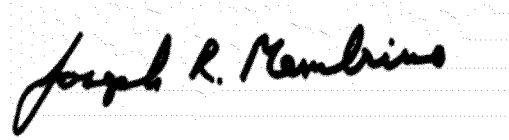
CVPIA directed the Secretary to make the cost an operation and maintenance expenditure to be reimbursed by the CVP contractors. Section 3406(b)(23). The full cost of Trinity restoration has not been paid and the fishery remains in decline. Unless the contracts are amended to enforce that obligation, the adverse impact on Indian Trust Assets will continue.

In conclusion, continuing the status quo perpetuates the adverse impacts on the Tribe's assets. Set forth in the attachment is a detailed description of the legal obligation the Secretary to enforce the contractors' payment responsibilities. The attachment also includes proposed specific provisions that the Tribe requests be included in the pending interim contracts.

Your attention to these comments is appreciated.

Ms. Rain Healer
January 29, 2010
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Very truly yours,

A handwritten signature in black ink, reading "Joseph R. Membrino", is written over a set of horizontal dotted lines. The signature is fluid and cursive.

Joseph R. Membrino

JRM:gln

Attachment

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